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This analysis begins with a review of how the regulatory process has evolved since the first student financial aid program, National Defense Student Loans, was established in 1958. Next, the regulatory process is examined, with particular emphasis on the ability of higher education and others to influence the results. It will then explore the reasons, stated or otherwise evident, for what in many quarters is considered to be over-regulation.

The analysis will examine how the federal regulatory process operates in other areas to ascertain the extent to which student aid may be subject to special treatment. Finally, some alternative regulatory approaches, which would seem less burdensome to the critics of the present situation, will be examined.

Some of the significant questions that will be addressed in the analysis include the hypothesis that regulations too often seem to be made in response to worst case situations. If that is determined to be the case, should all institutions be held to the same requirements? Is it appropriate to use student financial aid to achieve certain social and political objectives?

At any gathering of college administrators of student financial aid, it is virtually assured that one of the priorities for discussion will be yet another new regulation imposed on federal student aid. Many of these administrators could be expected to denounce the rule as unduly burdensome and insist that the problem the regulation seeks to address does not exist on their campuses. College presidents and other senior administrators have also begun to object to the number and content of rules that increase expenses when their budgets are being reduced or, in some cases, even interfere with institutional autonomy and academic independence.

A study for the National Association of Independent Colleges and Universities by the Institute for Higher Education Policy offers quantification of the extent of regulations applicable to federal student financial aid.[1] The study notes that these regulations in 1992 occupied over 7,000 sections of the Code of Federal Regulations. The study describes the regulations as burdensome, redundant, conflicting, and not related to what they were seeking to regulate.[2] Further, the study reveals that the complexity and often lack of clarity to be found in the rules have made it necessary for the Department of Education in a single year to issue 171 "Dear Colleague" letters.[3]

Evolution of the Regulatory Process

It would seem useful, initially, to examine how the categorical federal student aid programs came into existence, starting in the late 1950s. The National Defense Education Act of 1958, a response to the Soviet

Sputnik, created a National Defense Student Loan Program that provided low-interest loans to college students. Fellowships and traineeships in certain specified disciplines deemed critical to the national interest were also created.

In 1964, the College Work-Study Program came into existence as part of President Johnson's "War on Poverty." In what was a watershed piece of legislation, insofar as federal student aid is concerned, the Higher Education Act of 1965 brought together the loan and job programs under the administration of the U. S. Office of Education in the Department of Health, Education and Welfare. It also added a grant program, called Educational Opportunity Grants, and guaranteed loan programs to help middle-income students pay burgeoning college costs. Programs intended to prepare disadvantaged students for college such as Talent Search and Upward Bound were also part of the 1965 omnibus legislation. It is the reauthorization of this legislation every five or so years that permits the continuation and review of these aid programs along with the opportunity to add new ones.

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One of the most significant reauthorizations of the Higher Education Act of 1965 occurred in 1972. The legislation not only continued the existing programs but added: a Basic Grant Program to serve as a foundation for all other student aid; a State Student Incentive Grant Program aimed at inducing the states to establish their own state grant programs; and the Student Loan Marketing Association to provide liquidity for guaranteed student loans.

By 1972, then, the major federal student aid programs were in place. Subsequent reauthorizations and other related legislation dealt with issues particular to the times. The late 1970s witnessed efforts to help middle-income students cope with the costs of higher education through persistent efforts to find ways to get the lending community to commit more capital. Throughout the 1980s, concern over fraud and abuse and growing student loan default influenced the aid legislation. Another important development was the creation of the U. S. Department of Education in the early 1980s and the transfer of responsibilities that had been fulfilled by the Office of Education in the Department of Health, Education and Welfare.

When the first categorical federal student aid programs were established in the late 1950s and early 1960s, there were relatively few rules governing their use. When the Office of Education was called upon to implement the National Defense Student Loan Program, it invited to Washington, DC, representatives of colleges and universities to seek their advice on how the new resources should be used. Similarly, when the Office of Education was given responsibility for administering the College Work-Study Program, it turned to institutional presidents, treasurers, and aid administrators to help make the program operative. In addition to assisting in rule-making, these officials were asked to propose how the funds, called federal capital contributions, were to be distributed among the participating institutions.

It is interesting to note that the government, besides turning to college and university administrators for advice, hired college officials to fill key roles to manage the new programs. Jack Morse came from

Rensselaer Polytechnic Institute to implement the National Defense Student Loan Program. His former assistant there, Sumner Gambee, had a major role in developing the College Work-Study Program. Others who left academe to get the new programs started included Edward Sanders of Pomona College and William Shaw of Bowdoin College. Since there were very few institutional aid administrators at the time, many of these individuals had worked in college admissions.

As evidence of the small number of regulations, three years after the enactment of the Higher Education Act of 1965, Title 45 of the Code of Federal Regulations contained 13 sections pertaining to National Defense Student Loans.[4] There were also 13 sections each applicable to guaranteed loans for students in higher education and to those in vocational education.[5] At that time (1968), rules applicable to Educational Opportunity Grants and College Work-Study jobs were yet to be published. An increase in programs as well as their complexity meant, of course, significantly more regulations.

In 1974, two years after the passage of the very important amendments of 1972, Title 45 of the Code of Federal Regulations had already grown to 110 sections with four appendices; in other words 65 pages devoted to three loan programs, two grant programs and College Work-Study.[6] In addition, two sections covered the activities of the Student Loan Marketing Association.[7]

By 1982, two years after the creation of the Department of Education, matters pertaining to education were transferred from Title 45 to Title 34 of the Code of Federal Regulations. Besides rules applicable to the seven federal student aid programs then in existence, Student Assistance General Provisions were added. They dealt with such matters as student consumer information, audits, and institutional limitation, suspension and termination.[8] The 382 sections on federal student aid occupied 263 pages in the code.[9] The number of sections stood substantially below the 7,000 sections reported in 1994 in the study by the Institute of Higher Education Policy.

Current Regulatory Process

The process by which the Secretary of Education can issue the regulations deemed necessary to administer statutes pertaining to federal student aid programs and other education matters may be found for the most part in Title 20, Chapter 31, Section 1232 of the United States Code.[10] The term "regulation" includes rules, guidelines, interpretations, orders, and requirements that the Secretary chooses to prescribe.

Regulations must be published in the *Federal Register* and must cite the particular section of the statute to which they apply. The Secretary enjoys substantial flexibility in the issuing of regulations, save for the authority of Congress, that must be provided with a copy of any final regulation published in the *Federal Register.* Also, a master calendar applicable to the Department of Education provides that any regulation that will be imposed in the subsequent year be published by December 1.

The United States Code stipulates that no regulation can become effective until thirty days after it has been published in the *Federal Register.* During that thirty day period, comments concerning the rule

may be made by any interested party. The Secretary does have the latitude to declare that immediate implementation is required to avoid extreme hardship for the beneficiary of the rule and thus not be bound by the thirty day requirement. The Secretary must, instead, advise the Economic and Educational Opportunities Committee in the House and the Committee on Labor and Human Resources in the Senate. Unless either of those bodies objects within ten days, the thirty day requirement is waived.

In actual practice, the Secretary will typically issue a Notice of Proposed Rulemaking that is published in the *Federal Register.* The period for public comment is most often thirty to forty-five days. A very lengthy proposed rule can result in an extended period of sixty to ninety days. One who has long observed the comment process might conclude that the number of comments sometimes appear more significant to the Department of Education than their content.

The Congress may through a joint resolution of both Houses disapprove of a regulation published by the Secretary. In that case the Secretary can redraft the regulation, indicating how the Congressional objection has been addressed. Also, the Secretary is required within sixty days of the enactment of any legislation to submit to the Committee on Economic and Educational Opportunities in the House and the Committee on Labor and Human Resources in the Senate a schedule of how the regulations implementing the statute will be promulgated. The schedule may not exceed one hundred and eighty days following its submission to the Congress. Should it be necessary to extend the schedule, the Secretary may submit to the two Congressional committees a request for the approval of a new schedule.

A new procedure for the enactment of regulations was provided in the Higher Education Amendments of 1992. It is called negotiated rulemaking, but is limited to the parts of that statute which address the Federal Family Education Loan Program, General Provisions, and Program Integrity.[11] The much criticized State Postsecondary Reviews may be found under Part H—Program Integrity Triad.[12]

Under the negotiated rulemaking process, the Department of Education must hold public meetings to provide an opportunity for comment on the regulations it will prepare to carry out the statute. Discussion and a sharing of information on how the statute should be implemented take place at the public meetings. Also, the meeting attendees nominate to the Department individuals for consideration as participants in the negotiations. The small number of negotiators who are chosen by the Department are required to be representatives of parties such as higher education, the lending community, and students who will be affected by the rules. The rules that the Department drafts are then considered by the negotiators. Following the negotiations, rulemaking adheres to the same procedures as required for other proposed rules.

Reasons for Excessive Regulation

Certainly, regulations are not inherently bad and some regulatory effort is absolutely essential. A good deal of the legislation enacted by the Congress stipulates legislative intent and leaves to the federal department or agency the responsibility for specifying the rules by which

that intent will be implemented. Where Congress has little confidence in an agency or department, particularly when Congress is of one political party and the Administration is of the other, it may stipulate in considerable detail how the legislation is to be put into effect. This factor would seem to explain the rather micromanaged approach found in the 1986 and 1992 Higher Education Amendments.

An obvious reason for the quantity of regulations governing federal student aid is the growth in the number of programs and taxpayers' dollars invested in the enterprise. In the late 1950s there was only one categorical program, National Defense Student Loans, with an annual federal appropriation of about $58 million. Today the expenditure for federal student financial aid has grown to about $30 billion to support six large programs.

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In addition to the growth in programs and dollars expended for them, the nature of higher education and the students that it serves have become far more diverse than they were almost forty years ago. In the late 1950s and into the 1960s, the pattern was for high school graduates to move immediately into traditional colleges and to complete their studies, if they were to do so, in four years. Non-traditional students and two year community colleges and vocational institutions were not present in today's numbers. Even the law itself now speaks of "postsecondary education" rather than "higher education."

Two reasons are typically cited to justify the very extensive rules that apply to the current use of federal student financial aid. The first is the necessity for educational institutions, as well as students, to be held accountable for the use of these resources. The other reason is to assure the protection of students from unscrupulous providers of education. It is frequently asserted that the regulations are needed to eliminate or prevent fraud and abuse by both institutions and students. Evidence that either condition is rampant seems lacking and the major objection to onerous regulations is that all institutions of higher education are subject to these regulations even though the vast majority of colleges and universities are not misusing public resources or mistreating students.

Secretary of Education Richard W. Riley gave some indication last year of how he apparently feels about placing greater controls on institutions of higher education. He spoke of a "Congressional and public mandate to justify how colleges spend tax and tuition dollars."[13] A longtime Washington observer of the higher education scene, Terry W. Hartle of the American Council on Education (ACE), has written that the Administrations of President Ronald Reagan and George Bush, while not actually reducing the number of regulations affecting higher education, were less disposed to bring forth new regulations or to enforce those already in effect. Such is not the case, he notes, with the Clinton Administration, which he suggests seems "relatively indifferent to the paperwork and cost of the regulations which it promulgates."[14]

The higher education regulatory proclivities of the Clinton Administration reached a crisis stage in 1994 when the Education Department released its proposed rules for the State Postsecondary Review Entities (SPREs). Seeking to assure the academic integrity and fiscal capability

of institutions that wished to participate in the federal student aid programs, Congress in 1992 had enacted several initiatives aimed at achieving that end. The justification for the action rested largely in dissatisfaction with the process by which postsecondary education institutions were accredited.

Certainly, there had been objections to education rules that seemed onerous, costly and unnecessary, but they came mainly from middle level college administrators. With the prospect of the SPREs on the horizon, college executives, presidents, and chancellors entered the fray. The President of the University of Tampa, David G. Ruffer, asserted that the United States' leadership in higher education was being threatened.[15] President Gerhard Casper of Stanford University spoke of the initiative as "substantially federalizing an already flawed accreditation system." He warned of the possibility, without intending to do so, of moving "toward a 'Ministry of Education' that imposes standards and academic policies for every institution in the country."[16] Significant softening of the proposed rules has occurred, no doubt as a result of the protests by the leadership of the higher education community and its appeal to the Congress. Even the new Speaker of the House of Representatives, Newt Gingrich, indicated a willingness to suspend implementation of the SPREs.[17] By July 1995, the Department of Education backed off of the SPRE initiative and President Clinton signed a rescission bill that eliminated $20 million for its implementation.

The experience with the SPRE regulations establishes that more than complaints from the education community are needed to forestall regulations that seem excessively burdensome. Deep-seated philosophical considerations have to surface, such as the importance of retaining a system where academe maintains control of the curriculum and academic standards. The SPRE controversy, that may yet resurface, raises the important question of the status of higher education in America. Does it in fact enjoy a measure of autonomy denied to other institutions of our society or in the rest of the world for that matter? ACE's Terry Hartle suggests that the "innovation and experimentation" characteristic of American higher education results from its history of independence.[18]

A 1994 *Chronicle of Higher Education* article on the nomination of Judge Stephen Breyer to the Supreme Court noted that legal experts on higher education have tended to view the courts as willing to permit considerable flexibility to institutions of higher education in the manner they functioned.[19] Judge Breyer himself, in an article that he co-authored with Professor Richard Zeckhauser of Harvard, gives evidence of his views about the special status of higher education. Writing about controversial research, the two scholars warned that "the specter of government law enforcers in the research laboratory, university or hospital is not to be taken lightly."[20] It remains to be seen how in the light of challenged research billings, concern over the protection of student consumers, and alleged incidents of racial harassment, the autonomy that the two legal scholars have assigned to higher education will in any way be affected.

Regulatory Burdens Pervasive

There is a strong inclination for those who have worked for any length of time with federal student aid programs to feel that their activities

often seem to be singled out, perhaps more than any other area, for excessive regulation and documentation. Peter Howard's recent best seller, "The Death of Common Sense," provides rather extensive evidence that in virtually all areas of society and at all levels of government in this country, rules and paperwork have become unduly burdensome and often threaten desired outcomes.[21] Lest student financial aid administrators conclude that they are the most put-upon group of employees, Mr. Howard writes that the medical field is the most heavily regulated.

Despite a *Time* article disputing the accuracy of some of its examples of inappropriate rules, the Howard book is useful reading for anyone who wishes to peruse a reasoned explanation of why government rules have grown exponentially since the 1960s.[22] The author offers numerous example of the controls imposed by federal agencies, such as the VA, FDA, IRS, EPA and OSHA, to name a few. Mr. Howard presents the thesis that these rules seek to achieve a consistence or sameness of treatment and thus eliminate judgment and flexibility. He suggests that one of the reasons for this outcome is to eliminate the opportunity for the regulator to act in a capricious or arbitrary manner.

Recommendations for Regulatory Relief

There appears to be considerable agreement in Washington that regulatory relief is needed, not just in student financial aid but in most areas where the federal government is involved. Both the Clinton Administration and the Congress seem to be in accord that some reduction in bureaucratic red tape is in order. On September 30, 1993, President Clinton issued Executive Order 12866, entitled *Regulatory Planning and Review.* In the order he declared that "The American people deserve a regulatory system that works for them, not against them . . ."[23] His order sought to reform regulations and make them more efficient. Federal agencies were admonished to assess the costs and benefits, including the alternative of withholding regulation, not just for the federal government, but for the regulated and the public as well.[24] The Vice President was given the key role in the initiative, drawing on help from the Office of Management and Budget and the Office of Information and Regulation.[25]

More recently, the Republican members of Congress have introduced legislation that would roll back regulations in a number of areas as a part of their efforts to reduce big government. Those developments not withstanding, a Government Audit Office report recently termed the federal student aid programs susceptible to fraud and abuse and hence an area of great risk.[26]

Congress offered some prospect of again involving higher education in the drafting of new rules, when it provided for negotiated rulemaking in the Higher Education Amendments of 1992. The real issue remains just how much influence higher education will have in shaping the rules that the Department of Education finally publishes. At least a ray of hope for less burdensome procedures can be found, as described earlier, in the way the Department modified its initial SPRE rules. Of course, it took the concerted effort of college and university presidents and their claims of government interference with the integrity and independence of their institutions to soften the rules. It should not

be forgotten that it had been Congress' lack of confidence in higher education's accreditation process which had led it to authorize the SPREs in the Higher Education Amendments of 1992.

Beyond the modification of the SPRE rules, several other developments in the spring and summer of 1994 raised hope for relief from academe's regulatory burden. In May, the Department of Education announced that the Secretary had appointed fifteen individuals, most academicians, to the Panel on College Quality and Integrity. This new body was charged with offering counsel to the Secretary on recognizing accreditation bodies.[27] About the same time speculation began about how the new nominee to the Supreme Court, Steven Breyer, might be expected to react in cases where higher education and the government were seeking to resolve legal issues. It was expected that Judge Breyer, who had taught at Harvard, would favor the independence of colleges and universities.[28]

"Certainly, regulations are not inherently bad and some regulatory effort is absolutely essential."

Recently, Secretary of Education Riley called for proposals for about fifty or so experiments that would seek to reduce the regulatory burden that surrounds the administration of federal student aid programs. The *Federal Register* of April 25, 1995 invited individual or groups of colleges to submit proposals that gave promise of achieving such a goal.[29] During the experiments, the accepted participants would be exempt from related compliance requirements. The project has been placed under the direction of a new addition to the staff of the Department, Jeffrey Baker.[30] He is himself a former college financial aid administrator, who enjoys a very high regard among his former colleagues as a result of his experience and fairness.

Despite these developments that offer hope that the Department and the colleges working together can find ways to eliminate unnecessary activities and red tape, the Department continues to come forward with extremely burdensome requirements. The most recent of these is the Application for Institutional Participation in Programs Under the Higher Education Act of 1965 as amended (Institutional Eligibility and Certification for Title IV Student Financial Aid Programs). The application itself consists of Schedules A through Z, and it appears from examining them that most institutions are required to complete the majority of the schedules.[31] The application, instructions, errata, and accompanying materials on national and state accrediting bodies constitute a staggering array of paper and have already disturbed the financial aid administrators whose schools have been chosen to undergo the process. It does appear from reviewing the schedules that a good deal of the data being solicited is already available to the Department of Education in a variety of places. New regulations, it would seem, often result in the creation of a cottage industry. In the case of the new certification requirement, for example, a consulting firm specializing in federal student aid programs offers software and staff assistance to complete the application for the institution.

Even though there is hope that regulations and record keeping may be less burdensome, it seems evident that more specific actions should be taken. The time has come to restore reasonable judgment and flexibility to the institutional administration of federal student aid

programs. There needs to be less documentation of facts that have little or no significance for the determination of the ability of an institution of higher education to fulfill its mission. The aforementioned application to be certified to participate in federal student aid programs is a case in point. There is a need to establish an arbiter who can intervene between the Department's contention that a particular rule or document is absolutely essential to insuring the integrity of using federal resources, and institutions' insistence that the requirement is an unnecessary burden. Perhaps the newly created National Advisory Commission on Institutional Quality and Integrity, although appointed by the Secretary of Education, could be reprogrammed to serve such a function. Another possibility is the National Student Aid Advisory Committee. Of course, resorting to the courts to resolve conflict remains an alternative, but it is an interminably lengthy and expensive prospect.

" The SPRE controversy, that may yet resurface, raises the important question of the status of higher education in America. "

There are other steps that can be taken to lessen the regulatory burden on colleges and universities. Negotiated rulemaking offers real promise of a remedy if all regulations are subject to review and the Department is placed under an obligation to heed the advice that comes out of the process. Again, the National Advisory Commission on Institutional Quality and Integrity might play a role if it were given authority to overrule the regulation or a documentary requirement.

It would seem at long last to be reasonable to recognize that higher education and vocational training are sufficiently different in the way they function to justify separate regulation, quite possibly by different departments of the federal government. The principal point to be considered is that placing both under the same rules and documentary requirements results in an unjustified burden for higher education where in fact there are few instances of changes in ownership and location or the closing down of activities. The relatively short-term duration of proprietary education and its use of the clock hours approach are foreign to higher education and add to the complexity of the regulations and record keeping requirements.

The most promising solution to the regulatory burden is what is referred to as performance-based regulations. Drawing on the success of the Department of Education's Quality Assurance Program (once called the Quality Control Project), it is apparent that some institutions are quite capable of measuring where any problems exist in the administration of federal aid programs. They can then remedy their problems, drawing in some instances upon the experiences of peer institutions. The performance-based approach would entail establishing certain standards. If an institution met a particular standard, it would be relieved from a certain rule or document requirement. One of the most frequently cited examples of how such an approach might work uses a low student loan default rate as the performance standard. An institution that met an agreed upon level of default might be exempt from the requirements of exit interviews or could disburse a loan to an entering student at the time of registration instead of thirty days into the term. Secretary Riley's invitation for institutions to submit proposals for projects whose results could reduce regulation is clearly a way in which performance-based standards could be developed.

The point has been reached where the Congress, the Department of Education and postsecondary institutions through their associations or individually are in agreement that the bureaucratic red tape in federal student aid programs is out of control. The burden of regulation and record keeping can and must be reduced. Such a reduction would save significant resources both for the federal government and higher education, and still guard against fraud and abuse. More importantly for the future of the country, it would permit colleges and universities to concentrate more fully on what society expects of them, the education of the citizenry and the advancement of the frontiers of knowledge. ✦

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